

ST 96-14

Tax Type: SALES TAX

Issue: Reasonable Cause on Application of Penalties Assessed

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
SPRINGFIELD, ILLINOIS

THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS

versus

TAXPAYER
Taxpayer

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Docket #
IBT #
NOA #

RECOMMENDATION FOR DISPOSITION

APPEARANCE: ATTORNEY FOR TAXPAYER

SYNOPSIS:

ON MARCH 24, 1994, ILLINOIS DEPARTMENT OF REVENUE (THE "DEPARTMENT") ISSUED NOTICES OF ASSESSMENT FOR LATE PAYMENT PENALTIES AND INTEREST DUE TO TAXPAYER (THE "TAXPAYER"). THE NOTICES COVERED THE MONTHS OF MAY, 1993, AND JULY THROUGH OCTOBER, 1993. THE TAXPAYER HAD PAID THE TAX DUE. HE REQUESTED A HEARING ON THE ISSUE OF ABATEMENT OF PENALTIES BASED UPON THE FACT THAT AN EMPLOYEE OF THE TAXPAYER FAILED TO TIMELY FILE THE RETURNS. THE TAXPAYER ALSO ASSERTED THAT THERE WAS NO WILLFUL NEGLECT OR INTENTIONAL DISREGARD OF THE REVENUE LAWS ON HIS PART. THE TAXPAYER DID NOT PRESENT A REASONABLE CAUSE, AS INTERPRETED BY THE DEPARTMENT, TO ABATE THE PENALTIES. IT IS RECOMMENDED THAT THE PENALTIES BE UPHELD IN THEIR ENTIRETY.

FINDINGS OF FACT:

1. THE DEPARTMENT'S PRIMA FACIE CASE WAS ESTABLISHED BY ADMISSION INTO EVIDENCE OF DEPT. EX. NOS 1-3.
2. CPA, A CERTIFIED PUBLIC ACCOUNTANT, WAS EMPLOYED BY THE TAXPAYER AND WAS RESPONSIBLE FOR THE FILING AND PAYMENT OF TAXES DUE TO THE DEPARTMENT DURING THE PERIODS IN QUESTION. DEPT EX. NO. 2; TR. PP. 11-12
3. IN MAY, 1993, CPA NOTIFIED THE TAXPAYER THAT SHE HAD NOT FILED RETURNS FOR THE MONTHS OF MARCH AND APRIL, 1993. TR. P. 12
4. CPA WAS TERMINATED BY THE TAXPAYER IN JANUARY, 1994, FOR EXCESS ABSENTEEISM AMONG OTHER THINGS. TR. PP. 12-17
5. THERE WAS NO INTENT TO DECEIVE THE DEPARTMENT, NOR WAS THERE WILLFUL NEGLECT OR INTENTIONAL DISREGARD OF THE REVENUE LAWS IN THIS MATTER ON THE PART OF THE TAXPAYER. DEPT. EX. NO. 2; TR. P. 19
6. THE TAXPAYER HAD SUFFICIENT FUNDS AT THE TIME TO PAY THE TAX. TR. PP. 19-20

CONCLUSIONS OF LAW:

THE ILLINOIS CONSTITUTION PROVIDES FOR THE IMPOSITION OF THE RETAILERS OCCUPATION TAX AND RELATED TAXES PURSUANT TO ARTICLE IX SECTIONS ONE AND TWO OF THE ILLINOIS CONSTITUTION OF 1970. THEY STATE:

§ 1. State Revenue Power

THE GENERAL ASSEMBLY HAS THE EXCLUSIVE POWER TO RAISE REVENUE BY LAW EXCEPT AS LIMITED OR OTHERWISE PROVIDED IN THIS CONSTITUTION. THE POWER OF TAXATION SHALL NOT BE SURRENDERED, SUSPENDED, OR CONTRACTED AWAY.

§ 2. Non-Property Taxes-Classification, Exemptions, Deductions, Allowances and Credits

IN ANY LAW CLASSIFYING THE SUBJECTS OR OBJECTS OF NON-PROPERTY TAXES OR FEES, THE CLASSES SHALL BE REASONABLE AND THE SUBJECTS AND OBJECTS WITHIN EACH CLASS SHALL BE TAXED UNIFORMLY. EXEMPTIONS, DEDUCTIONS, CREDITS, REFUNDS AND OTHER ALLOWANCES SHALL BE REASONABLE.

UNDER THE RETAILERS OCCUPATION TAX ACT AND RELATED LAWS, THE STATE OF ILLINOIS IMPOSES A PENALTY FOR FAILURE TO MAKE A RETURN OR PAY TAX PURSUANT TO 35 ILCS 120/5 AS FOLLOWS:

§5. IN CASE ANY PERSON ENGAGED IN THE BUSINESS OF SELLING TANGIBLE PERSONAL PROPERTY AT RETAIL FAILS TO FILE A RETURN WHEN AS HEREIN REQUIRED, BUT THEREAFTER, PRIOR TO THE DEPARTMENT'S ISSUANCE OF A NOTICE OF TAX LIABILITY UNDER THIS SECTION, FILES A RETURN AND PAYS THE TAX, HE SHALL ALSO PAY A PENALTY IN AN AMOUNT DETERMINED IN ACCORDANCE WITH SECTION 3-3 OF THE UNIFORM PENALTY AND INTEREST ACT.

THE UNIFORM PENALTY AND INTEREST ACT IS FOUND AT 35 ILCS 735 AND §3-3 ADDRESSES THE ISSUE OF IMPOSITION OF A PENALTY FOR FAILURE TO FILE OR PAY A TAX THAT IS DUE. IT STATES:

§ 3-3. A PENALTY OF 5% OF THE TAX REQUIRED TO BE SHOWN SHALL BE IMPOSED FOR FAILURE TO FILE ANY TAX RETURN ON OR BEFORE THE DATE DUE (PENALTY FOR LATE FILING OR NONFILING). IF THE UNFILED RETURN IS FILED BEFORE 21 DAYS AFTER NOTICE BY THE DEPARTMENT, NO LATE FILING OR NONFILING PENALTY SHALL BE ASSESSED. IF A PENALTY FOR LATE FILING OR NONFILING IS IMPOSED IN ADDITION TO A PENALTY FOR LATE PAYMENT, THE TOTAL PENALTY DUE SHALL BE THE SUM OF THE LATE FILING PENALTY AND THE APPLICABLE LATE PAYMENT PENALTY.

SECTION 3-8 OF THE SAME ACT ADDRESSES THE ISSUE OF WHEN PENALTIES CAN BE ABATED. IT STATES:

§ 3-8. NO PENALTIES IF REASONABLE CAUSE EXISTS. THE PENALTIES IMPOSED UNDER THE PROVISIONS OF SECTIONS 3-3 AND 3-4 OF THIS ACT SHALL NOT APPLY IF THE TAXPAYER SHOWS THAT HIS FAILURE TO FILE A RETURN OR PAY TAX AT THE REQUIRED TIME WAS DUE TO REASONABLE CAUSE. REASONABLE CAUSE SHALL BE DETERMINED IN EACH SITUATION IN ACCORDANCE WITH THE RULES AND REGULATIONS PROMULGATED BY THE DEPARTMENT. AT THE REQUEST OF THE TAXPAYER, SUCH DETERMINATION SHALL BE MADE BY THE DEPARTMENT BEFORE THE IMPOSITION OF THE

PENALTY. A TAXPAYER MAY PROTEST THE IMPOSITION OF A PENALTY UNDER SECTION 3-3 OR 3-4 ON THE BASIS OF REASONABLE CAUSE WITHOUT PROTESTING THE UNDERLYING TAX LIABILITY.

PURSUANT TO THE AUTHORITY GRANTED BY THE LEGISLATURE, THE DEPARTMENT HAS PROMULGATED RULES INTERPRETING REASONABLE CAUSE AT 86 ILL. ADMIN. CODE CH I, SEC. 700.400. IT STATES:

- A) (SECTION 3-8 OF THE ACT)
- B) THE DETERMINATION OF WHETHER A TAXPAYER ACTED WITH REASONABLE CAUSE SHALL BE MADE ON A CASE BY CASE BASIS TAKING INTO ACCOUNT ALL PERTINENT FACTS AND CIRCUMSTANCES. THE MOST IMPORTANT FACTOR TO BE CONSIDERED IN MAKING A DETERMINATION TO ABATE A PENALTY WILL BE THE EXTENT TO WHICH THE TAXPAYER MADE A GOOD FAITH EFFORT TO DETERMINE HIS PROPER TAX LIABILITY AND TO FILE AND PAY HIS PROPER LIABILITY IN A TIMELY FASHION.
- C) A TAXPAYER WILL BE CONSIDERED TO HAVE MADE A GOOD FAITH EFFORT TO DETERMINE AND FILE AND PAY HIS PROPER TAX LIABILITY IF HE EXERCISED ORDINARY BUSINESS CARE AND PRUDENCE IN DOING SO. A DETERMINATION OF WHETHER A TAXPAYER EXERCISED ORDINARY BUSINESS CARE AND PRUDENCE IS DEPENDENT UPON THE CLARITY OF THE LAW OR ITS INTERPRETATION AND THE TAXPAYER'S EXPERIENCE, KNOWLEDGE, AND EDUCATION. ACCORDINGLY, RELIANCE ON THE ADVICE OF A PROFESSIONAL DOES NOT NECESSARILY ESTABLISH THAT A TAXPAYER EXERCISED ORDINARY BUSINESS CARE AND PRUDENCE, NOR DOES RELIANCE ON INCORRECT FACTS SUCH AS AN ERRONEOUS INFORMATION RETURN.
- D) THE DEPARTMENT WILL ALSO CONSIDER A TAXPAYER'S FILING HISTORY IN DETERMINING WHETHER THE TAXPAYER ACTED IN GOOD FAITH IN DETERMINING AND PAYING HIS TAX LIABILITY. ISOLATED COMPUTATIONAL OR TRANSCRIPTIONAL ERRORS WILL NOT GENERALLY INDICATE A LACK OF GOOD FAITH IN THE PREPARATION OF A TAXPAYER'S RETURN.
- E) EXAMPLES OF REASONABLE CAUSE. THE FOLLOWING NON-EXCLUSIVE LIST OF SITUATIONS WILL CONSTITUTE REASONABLE CAUSE FOR PURPOSES OF THE ABATEMENT OF PENALTIES:
 - 1) REASONABLE CAUSE FOR ABATEMENT OF PENALTY WILL EXIST IF A LIABILITY RESULTS FROM AMENDMENTS MADE BY THE DEPARTMENT TO REGULATIONS OR FORMAL ADMINISTRATIVE POLICIES OR POSITIONS AFTER THE RETURN ON WHICH THE LIABILITY WAS COMPUTED WAS FILED.

- 2) REASONABLE CAUSE FOR ABATEMENT MAY ALSO BE BASED ON THE DEATH, INCAPACITY OR SERIOUS ILLNESS OF THE TAXPAYER (OR HIS TAX PREPARER) OR A DEATH OR SERIOUS ILLNESS IN HIS OR HER IMMEDIATE FAMILY WHICH CAUSES A LATE FILING AND PAYMENT OF TAX DUE....
- 3) AN UNAVOIDABLE ABSENCE OF A TAX PAYER (OR TAX PREPARER) DUE TO CIRCUMSTANCES UNFORESEEABLE BY A REASONABLE PERSON MAY ALSO CONSTITUTE REASONABLE CAUSE FOR PURPOSES OF ABATEMENT OF THE PENALTY. AN UNAVOIDABLE ABSENCE DOES NOT INCLUDE A PLANNED ABSENCE SUCH AS A VACATION. IN THE CASE OF A CORPORATION, ESTATE, TRUST, ETC., THE ABSENCE MUST HAVE BEEN OF AN INDIVIDUAL HAVING SOLE AUTHORITY TO FILE THE RETURN (NOT THE INDIVIDUAL PREPARING THE RETURN) OR MAKE THE DEPOSIT/PAYMENT.
- 4) FACTORS BEYOND TAXPAYER'S CONTROL SUCH AS DESTRUCTION BY FIRE, OTHER CASUALTY OR CIVIL DISTURBANCE, OF THE TAXPAYER RESIDENCE OR PLACE OF BUSINESS RECORDS.
- 5) TAXPAYER MAILED THE RETURN OR PAYMENT TO THE DEPARTMENT IN TIME TO REACH THE DEPARTMENT ON OR BEFORE THE DUE DATE, GIVEN THE NORMAL HANDLING OF THE MAIL. HOWEVER, THROUGH NO FAULT OF THE TAXPAYER, THE RETURN OR PAYMENT WAS NOT DELIVERED WITHIN THE PRESCRIBED TIME PERIOD. THIS FACT SITUATION WOULD CONSTITUTE REASONABLE CAUSE FOR ABATEMENT OF THE PENALTY.
- 6) REASONABLE CAUSE WILL EXIST FOR PURPOSES OF ABATEMENT OF THE PENALTY IF A TAXPAYER MAKES AN HONEST MISTAKE, SUCH AS INADVERTENTLY MAILING A DEPARTMENT OF REVENUE CHECK TO A LOCAL GOVERNMENT, ANOTHER STATE'S DEPARTMENT OF REVENUE, OR THE INTERNAL REVENUE SERVICE.
- 7) AN ILLINOIS APPELLATE COURT DECISION, A U.S. APPELLATE COURT DECISION, OR AN APPELLATE COURT DECISION FROM ANOTHER STATE (PROVIDED THAT THE APPELLATE COURT CASE IN THE OTHER STATE IS BASED UPON SUBSTANTIALLY SIMILAR STATUTORY OR REGULATORY LAW) WHICH SUPPORTS THE TAXPAYER'S POSITION WILL ORDINARILY PROVIDE A BASIS FOR A REASONABLE CAUSE DETERMINATION.

A LATE FILING PENALTY CAN BE IMPOSED WHERE FULL PAYMENT OF TAX IS MADE WITH THE LATE FILED RETURN. THE DEPARTMENT OF REVENUE V. SHORE LINE PETROLEUM COMPANY, 7 ILL.2D 186 (1955).

ON THE BACK OF EACH OF THE ASSESSMENTS ISSUED TO THE TAXPAYER IN THIS MATTER WAS THE STATEMENT, "THE CIRCUMSTANCES OF THE LATE FILING OF YOUR RETURN DO NOT CONSTITUTE A 'REASONABLE CAUSE' AS CURRENTLY DEFINED BY THE DEPARTMENT". THE NOTICES OF ASSESSMENT ARE PRESUMED TO BE CORRECT AND THE TAXPAYER HAS FAILED TO MEET HIS BURDEN OF PROOF TO OVERCOME THE DEPARTMENT'S PRIMA FACIE CASE. MASINI V. DEPARTMENT OF REVENUE, 60 ILL.APP.3D 11 (1978) CITING ANDERSON V. DEPARTMENT OF FINANCE, 370 ILL. 225 (1938).

THERE IS NO PROVISION IN THE REVENUE ACTS FOR AN ABATEMENT OF LATE FILING PENALTIES BASED UPON THE FACT THAT A TAXPAYER RELIED UPON A CERTIFIED PUBLIC ACCOUNTANT TO FILE THE TAXES AND THE ACCOUNTANT FAILED TO TIMELY FILE THEM. IN FACT, THE REPRESENTATIVE OF THE TAXPAYER TESTIFIED THAT HE WAS AWARE THAT THE EMPLOYEE HAD NOT FILED THE RETURNS FOR MARCH AND APRIL IN A TIMELY MANNER. IT COULD BE PRESUMED THAT THE TAXPAYER HAD NOTICE THAT THE EMPLOYEE WAS NOT, IN FACT, FILING THE RETURNS IN A TIMELY MANNER.

THERE IS ALSO NO PROVISION FOR ABATEMENT OF PENALTIES IN THE REVENUE STATUTES OR RULES DUE TO THE LACK OF WILLFUL NEGLECT OR INTENTIONAL DISREGARD OF THE REVENUE LAWS BY THE TAXPAYER.

IT IS THEREFORE RECOMMENDED THAT THE DIRECTOR OF THE DEPARTMENT UPHOLD NOTICES OF ASSESSMENT NUMBERS XXXXX IN THEIR ENTIRETY.

RESPECTFULLY SUBMITTED,

BARBARA S. ROWE
ADMINISTRATIVE LAW JUDGE
JANUARY 12, 1996